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IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

TIMOTHY WHITTIER,)	
)	
Appellant,)	
)	IPC NO. 98-03
)	
vs.)	
)	DECISION AND ORDER ON
IDAHO DEPARTMENT OF)	PETITION FOR REVIEW
HEALTH AND WELFARE,)	
)	
Respondent.)	
_____)	

On Petition for Review from the decision of the hearing officer, Elaine Eberharter-Maki. Appellant Timothy Whittier (hereinafter Whittier or Appellant) appeared through his counsel of record, John C. Lynn, Boise, Idaho. Respondent Idaho Department of Health and Welfare (hereinafter DHW) appeared through its counsel of record, Jeanne Goodenough and Ron Christian, Deputy Attorneys General, Human Services Division, Boise, Idaho.

Whittier petitions for review from the hearing officer's decision upholding DHW's dismissal of Whittier from the classified service. Following an evidentiary hearing, the hearing officer determined that DHW established a preponderance of the evidence that: (1) Whittier intentionally disregarded directives regarding the processing of conference

registration funds, disconnecting a telephone answering machine, and arranging the transfer of telephone lines; and (2) Whittier failed to institute internal controls to protect conference funds and DHW employees. The hearing officer ruled that the Appellant was properly dismissed pursuant to IDAPA 28.01.01.190.09.b (negligence) and IDAPA 28.01.01.190.01.d (insubordination). For the reasons set forth below, WE AFFIRM.

I.

BACKGROUND

Whittier was employed by DHW from August 15, 1995 until January 19, 1998. At the time of his dismissal, Whittier was Health Policy Supervisor of DHW's Division of Health.

On December 15, 1997, Whittier was placed on administrative leave with pay pending an investigation of his actions relating to certain conference registration fees. On December 31, 1997, Whittier received a Notice of Contemplated Action and performance evaluation report for the period May 23, 1997 to December 31, 1997, with an overall rating of "unsatisfactory."

Whittier filed a written response. On January 14, 1998, he was provided an informal opportunity to respond to the contemplated termination. He did so with benefit of counsel.

On January 19, 1998, Richard Schultz, Administrator of DHW, Division of Health, (hereinafter "Schultz") terminated Whittier's employment with DHW. The notice of dismissal cited violations of Rule 190.01, specifically IDAPA 28.01.01.190.01.a, .b, .d, and .e, and incorporated the December 31, 1997 performance evaluation as setting forth the factual basis for the dismissal.

Whittier appealed the dismissal and the matter was assigned to a hearing officer. An evidentiary hearing was conducted on August 11, 12, 13, 14, 21 and September 10, 1998.

The hearing officer's Findings of Fact, Conclusions of Law and Order were entered February 5, 1998. The hearing officer determined that DHW proved, by a preponderance of the

evidence, four of its factual allegations regarding negligence and insubordination. Based on this determination, the hearing officer upheld Whittier's dismissal.

Whittier filed a timely petition for review. DHW did not appeal the hearing officer's findings or conclusions regarding the allegations that the hearing officer determined were unproven.

II.

ISSUES

We address the following issues on appeal:

1. Whether the hearing officer erred in determining that Whittier was insubordinate and negligent in the performance of his duties;
2. Whether the hearing officer erred in upholding dismissal as an appropriate disciplinary action on the facts of this case;
3. Whether the hearing officer erred in upholding dismissal when DHW dismissed Whittier without providing notice of all of the documentary evidence supporting dismissal as a part of the Notice of Contemplated Action;
4. Whether the hearing officer erred in refusing to allow certain discovery to take place; and
5. Whether the hearing officer erred by failing to make explicit findings regarding witness credibility.

III.

STANDARD AND SCOPE OF REVIEW

The standard and scope of review on disciplinary appeals to the Commission is as follows:

. . . When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 28.01.01.201.06. That is, the burden of proof is on the state to show that at

least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.

On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, transcript, and briefs submitted by the parties. Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). We exercise free review over issues of law. The Commission may affirm, reverse or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

Soong v. Idaho Dep't of Health and Welfare, IPC No. 94-03 (February 21, 1996), *aff'd* Case No. CV-96-00106 (Dist. Ct. 2nd Dec. 6, 1996) (footnote omitted).

IV.

DISCUSSION

A. The hearing officer's determination that Whittier was insubordinate or refused to perform duties as ordered is supported by substantial evidence.

DHW dismissed Appellant citing violations of IDAPA 28.01.01.01.190.01 (now IDAPA 15.04.01.190.01), commonly referred to as Rule 190. Rule 190 sets forth the causes for the disciplinary dismissal, demotion or suspension of a classified employee of the state. The causes include:

- a. Failure to perform the duties and carry out the obligations imposed by the state constitution, state statutes, or rules of the department.
- b. Inefficiency, incompetence or negligence in performing duties.
- ...
- c. Refusal to accept a reasonable and proper assignment from an authorized supervisor.
- d. Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department.

The hearing officer rendered detailed findings of fact, carefully reviewing the evidence DHW introduced in support of its various allegations of misconduct. The hearing officer painstakingly evaluated that evidence in light of the evidence Whittier introduced in response to those charges. In all, 23 performance issues were identified in Whittier's December 31, 1997 evaluation. The hearing

officer determined that there was sufficient evidence to support dismissal only on four of the 23 issues.

During testimony, Director Schultz was asked which of the many performance problems cited in the termination documents were most important. Schultz replied that Whittier's prior performance had been sufficiently good that any one of the issues, surfacing alone, could have been dealt with in an action less than termination. According to Schultz, it was "the weight of all the issues" that prompted dismissal. Based on Schultz' testimony, Whittier argues that all 23 of the allegations must be proved or the dismissal must be reversed. We disagree.

Idaho Code § 67-5309(n) is clear. Any one violation, when proven, can constitute proper cause for dismissal. IDAPA 15.04.01.190.01 is in accord.

In May v. Idaho Dep't of Health and Welfare, IPC No. 96-01, 1997 IPC Reports 1,9, we discussed DHW's obligation in termination cases and observed that:

The IPC Rules mandate that the department, in a discipline case, carries the burden of proof by a "preponderance of the evidence." That is, the department must prove *at least one* of the 17 proper cause reasons for discipline, as listed in Rule 190, by a preponderance of the evidence. (Emphasis added).
Cheney v. Dep't of Correction, IPC No. 97-15.

The hearing officer concluded, and we agree, that DHW carried its burden of proof of at least one of the 17 proper cause reasons to terminate. Although the Schultz' testimony suggests that the decision to terminate was prompted by the weight of all of the issues, existing law requires proof of only one of the proper cause reasons for discipline as a prerequisite for imposition of discipline.

1. Insubordination.

Insubordination is "a willful or intentional disregard of the lawful and reasonable instructions of the employer." Blacks Law Dictionary 801 (6th Ed. 1990). Accordingly, a finding of

insubordination requires proof that the employee intentionally or willfully disregarded a lawful and reasonable instruction from an employer or supervisor.

The hearing officer concluded that Whittier was insubordinate in specifically disobeying three directives from his immediate supervisor, Jane Smith (hereinafter “Smith”). These directives prohibited Whittier from bringing “Scoops Conference” registration money into DHW for processing; required that he disconnect a telephone answering machine; and directed that he forward telephone lines (for answering) during a budget meeting.

Although Whittier testified at length about reasons why he did not do so, he admits that he neither disconnected the answering machine as directed, nor forwarded the telephone lines. The hearing officer’s conclusion that this behavior constituted insubordination was premised on the fact that Whittier admittedly *did not do what he was told to do*.

We need not reach the issue of the “Scoops Conference deposits.” The testimony regarding Whittier’s refusal to obey his supervisor’s directives with respect to the telephone lines and answering machine is substantial and competent evidence of insubordination. Under the existing Commission statute and rule, this evidence provides proper cause for discipline.

2. Negligence.

Whittier utilized DHW staff and resources to process conference registration fees during business hours despite his supervisor’s directive to the contrary. The hearing officer determined that Whittier had a duty to take steps to protect the money and the employees from the risk of mishandling the money and concluded that he did not do so. The hearing officer concluded that Whittier’s failure to institute internal controls to protect funds and employees constituted negligence in the performance of his duties.

A conclusion of negligence requires proof of a duty owed. No credible evidence of any duty owed was introduced. In essence, Whittier was found negligent for not treating the money as if it

belonged to the state when, in fact, it did not. We find no support in the record for dismissal on the basis of negligence.

B. The hearing officer did not err in upholding the dismissal where fewer than all the alleged factual bases were proved.

Whittier argues that termination is not an appropriate disciplinary mechanism in this case. Relying on the testimony of Schultz (“weight of all the issues”) and the fact that the Hearing Officer sustained only four of the 23 factual allegations, Whittier contends that termination was inappropriate and excessive discipline.

Proof of any one of Rule 190’s listed causes is sufficient for imposition of discipline. Disciplinary choices include suspension, termination, and demotion. In disciplinary matters, the agency has the choice as to the type of discipline it wishes to impose. Webster v. Dep’t of Health and Welfare, IPC No. 96-14, 1997 IPC Reports 74.

In this case, the agency exercised its discretion in choosing termination. Substantial evidence supports the hearing officer’s determination that DHW had proper cause to impose discipline based on insubordination. The Commission will not substitute its judgment with respect to the appropriateness of the method of discipline.

C. DHW did not, as a matter of law, deny Whittier the due process to which he was entitled.

Whittier acknowledges that he received notice of the allegations of misconduct for which his dismissal was being considered prior to his meeting with Schultz. Whittier contends that DHW should have provided him all of the evidence supporting those allegations before the Schultz meeting. While we disagree with Whittier’s contention, agencies are advised to carefully consider allegations and evidence and rely on those allegations that are both substantive and material, rather than utilizing what might best be characterized as a “shotgun” approach.

In 1993, the Idaho Supreme Court interpreted the due process to be afforded to state employees prior to disciplinary action being imposed.

It was well established that due process requires, at a minimum, notice of the contemplated action and notice of the basis and evidence relied upon for the contemplated action, and an opportunity to respond. *Loudermill*, 470 U.S. 532, 538, 105 S. Ct. at 1495. The first component of the due process requirement, notice, may be an oral or written notification of the charges against the employee and the basis and evidence supporting those charges. *Loudermill*, 470 U.S. at 546, 195 S. Ct. at 1495. The second component of the due process requirement, opportunity to respond, is an opportunity for the employee, either in person or in writing, to present his or hear reasons “why *proposed* action should not be taken” *Loudermill*, 470 U.S. at 546, 105 S. Ct. at 1495 (emphasis added). Arnzen, 123 Idaho 899 at 904, 854 P.2d 242 at 247.

See also May v. Idaho Dep’t of Health and Welfare, IPC No. 96-01, 1997 IPC Reports 1, 6; Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Nothing in statute or rule requires that all evidence supporting a disciplinary decision be disclosed to the employee before the disciplinary decision has been made. In Hansen v. Idaho Dep’t of Correction, IPC No. 94-42 (December 15, 1995), we held that a classified state employee is not entitled to a full evidentiary hearing before a decision to discipline is made, but instead is entitled to:

(1) notice of the contemplated action; (2) notice of the basis of such action; (3) notice of the substance of the evidence supporting such action; and (4) an opportunity to respond before the decision is made.

May at page 7. See also A. E. “Ed” Fridenstine v. Idaho Dep’t of Administration, 1999 Opinion No. 87 (August 12, 1999).

Whittier was provided the required notice of contemplated disciplinary action. An employment evaluation identifying the substance of the factual allegations supporting the notice was attached. Whittier was provided the opportunity to respond to the Notice, and did so. Attached to the subsequent letter of dismissal was other information relevant to the reasons for the disciplinary action taken. None of the additional documents that were provided expanded the initial reasons for termination.

Whittier was afforded all of the process due as a part of his limited pre-termination rights. He received notice of the contemplated action, the basis for the action, the substance of the evidence, and the opportunity to respond. Full due process occurred, as is required, post-termination during the appeal process in a several day proceeding before the Hearing Officer. Cheney v. Dep't of Correction, IPC No. 97-15, p.12.

D. The hearing officer was not required to make specific findings of witness credibility.

The parties agree that credibility is a crucial issue in this case. Whittier argues that the hearing officer was required to make specific findings of credibility and did not do so.

The primary conflict in testimony before the hearing officer was the discrepancy between DHW's witnesses and Whittier's regarding the Scoops Conference money. DHW's witnesses testified that Whittier was told to do certain things regarding the answering machine, the telephone, and the conference monies and that he did not do what he was told to do. Whittier admitted that he had refused to do as he was told regarding the telephone and answering machine. In relation to the conference money, Whittier testified that he was never told not to bring the money with him to work or forbidden to use DHW staff for purposes of depositing it. On these four issues, the hearing officer was clearly persuaded by the DHW witnesses.

The hearing officer was not so clearly persuaded by DHW witnesses on the remaining 19 allegations. The fact that the hearing officer was persuaded on some but not all of the allegations evidences the careful evaluation of evidence presented and the implicit examination of credibility of the witnesses. As the Idaho Court of Appeals observed:

[T]he Personnel Commission need not accept the hearing officer's factual determinations on every case where credibility of witnesses is a factor. The hearing officer's sole advantage over the Commission as a fact-finder is his ability to observe the demeanor of the witnesses.... [T]here will be many cases where the Commission need not rely upon or accept the credibility determinations of its hearing officer. But where credibility is crucial and where first-hand exposure to the witnesses may strongly affect the outcome, we think the Personnel Commission should not

override the hearing officer's impressions unless it makes a cogent explanation of its reasons for doing so.

Dep't of Health and Welfare v. Sandoval, 113, Idaho 186, 190, 742 P.2d 992, 996 (Ct. App. 1987).

See also Starr v. Idaho Transportation Dep't, 118 Idaho 127, 795 P.2d 21 (Ct. App. 1990). This case does not require us to override the hearing officer's impressions.

E. The hearing officer's decision not to allow all requested discovery was proper.

Whittier asserts as err the denial of his request to depose Tracy Goodin and the limitation of access to documentary evidence. The hearing officer required DHW to provide only those documents that it intended to use as exhibits in the proceeding. Whittier argues that these denials and limitations deprived him of due process by impermissibly limiting his right to review all discoverable documentation.

Discovery before the hearing officer in administrative proceedings is not unlimited, it occurs pursuant to Commission Rule 201. IDAPA 15.04.01.201. Rule 201 incorporates by reference the Idaho Attorney General's Model Rules of Administrative Procedure (IDAPA 04.11.01), in particular Rule 521.

Rule 521 provides that the parties may agree among themselves to provide for discovery without reference to an agency's statutes. Otherwise, the rule provides, "no party before the agency is entitled to engage in discovery unless discovery is authorized before the agency, the party moves to compel discovery, and the agency issues an order directing that the discovery be answered." IDAPA 04.11.01.521. Accordingly, discovery before the hearing officer in appeals to the Commission occurs either by stipulation of the parties or by order of the hearing officer upon request of a party.

In this case, the hearing officer directed the parties to attempt to reach an agreement with respect to the scope of discovery. As to those issues that the parties could not agree upon, the hearing officer properly viewed the admission or exclusion of evidence as a discretionary decision.

The Idaho Attorney General's Model Rules of Administrative Procedure refer to the Idaho Rules of Civil Procedure with respect to the scope of discovery. Rule 26(b), I.R.C.P., allows discovery in civil matters where reasonably calculated to lead to the discovery of relevant and material information.

The hearing officer determined to admit only evidence "logically relevant to the issues at hand." The hearing officer required that the evidence "advance the inquiry at hand," and prohibited evidence that was "cumulative, misleading, time wasting or not relevant." Accordingly, discovery was limited to only that information and those witnesses directly related to the termination reasons set forth in the notice of contemplated dismissal of December 31, 1997 and the termination letter of January 19, 1998. We find no abuse of the hearing officer's discretion, as this appears to be a sensible interpretation of authority that is in accord with the requirements of Rule 26(b), I.R.C.P.

V.

CONCLUSION

We have reviewed the record, the transcript and the briefs submitted by the parties. We allowed oral argument. During oral argument, certain remarks were made that took on an inappropriate tone. Future practice before the Commission will require that all parties demonstrate an appropriate level of professionalism and civility, both in their dealings with each other and in their appearances before the Commission.

Based on our review and after consideration of the arguments of counsel during the oral argument, we conclude that Timothy Whittier received the requisite Constitutional Due Process before DHW made the decision to terminate him.

The hearing officer carefully considered all of the evidence presented by both sides; implicit in this consideration and evaluation is a determination of witness credibility. The hearing officer is

not required to make specific findings regarding witness credibility and we find no reason to substitute an alternative determination in this case.

Discovery is not an unlimited privilege. On the facts of this matter, it does not appear that the hearing officer abused her discretion in denying the deposition of Tracey Goodin or in refusing to require DHW to produce documentary evidence other than that relied upon as a part of the termination decision.

Although we disagree with the hearing officer's determination with respect to the issue of negligence, we find that substantial, competent evidence supports the hearing officer's determination that Timothy Whittier was insubordinate or refused to perform duties in violation of IDAPA 15.04.01.190.01.c and .d. It was not necessary for each of the alleged factual basis to be proven before dismissal could be sustained: proof of one of the factual bases was sufficient.

Accordingly, we AFFIRM the decision of the hearing officer upholding Timothy Whittier's termination from employment by the Idaho Department of Health and Welfare on the grounds of insubordination.

VI.

STATEMENT OF APPEAL RIGHTS

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code §67-5327(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

1. That the findings of fact are not based on any substantial, competent evidence;
2. That the commission has acted without jurisdiction or in excess of its powers;
3. That the findings of fact by the commission do not as a matter of law support the decision. Idaho Code §67-5328.

DATED this 24 day of September, 1999.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

_____/s/_____
Michael Brassey, Chair

_____/s/_____
Ken Wieneke

_____/s/_____
Don Miller

_____/s/_____
Clarisse Maxwell

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Decision and Order on Petition for Review in Whittier v. Idaho Dep't of Health and Welfare, IPC No. 98-3, was delivered to the following parties by the method stated below on the 24th day of September, 1999.

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_____/s/_____
Val E. Rodriguez
Secretary to the Commission